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Leslie Salt Co. v. United States: Does the Recent Supreme Court Decision in *United States v. Lopez* Dictate the Abrogation of the "Migratory Bird Rule"?

by

Michael Bablo

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NOTES

Leslie Salt Co. v. United States[1]: Does the Recent Supreme Court Decision in *United States v. Lopez* Dictate the Abrogation of the "Migratory Bird Rule"?[2]

I. INTRODUCTION

The purpose of the Clean Water Act[3] is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[4] To further this purpose, the CWA prohibits "the discharge of dredged or filled material into the navigable waters" without a permit issued by the Army Corps of Engineers ("Corps").[5] The CWA defines navigable waters as "waters of the United States," but does not define "waters of the United States."[6] The Environmental Protection Agency ("EPA") supplies a definition that includes "wetlands . . . [when the] use, degradation, or destruction of which could affect the interstate or foreign commerce."[7] Further, the Corps' determined that the "waters of the United States" will include waters "which are or would be used as habitat by other migratory birds which cross state lines."[8]

In *Leslie Salt Co. v. United States IV*, the United States Court of Appeals for the Ninth Circuit was faced with an appeal seeking to revisit the determination that the Corps' jurisdiction under the CWA reaches isolated wetlands used only by migratory birds and that Congress has the ability to regulate these wetlands pursuant to the Commerce Clause.[9] The Ninth Circuit held that the Corps' determination that the CWA reached such waters was a reasonable interpretation of the CWA and that the broad sweep of the Commerce Clause can reach the regulation of these wetlands.[10] Therefore, the court affirmed both holdings of its earlier decision.[11]

In 1995, the Supreme Court decided *United States v. Lopez*.[12] In *Lopez*, the Supreme Court held that Congress exceeded its Commerce Power in enacting the Gun-Free School Zones Act.[13] The *Lopez* decision is the first time in ap-

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[1]The migratory bird rule refers to the Army Corps of Engineers determination that isolated wetlands can be regulated because of the fact that migratory birds use these wetlands as habitat thereby affecting interstate commerce.

[2]55 F.3d 1388 (9th Cir. 1995).

[3]Federal Water Pollution Control Act, 33 U.S.C. § 1251-1387 (1988). The FWPCA is commonly referred to as the Clean Water Act.

[4]33 U.S.C. § 1251(a) (1996).

[5]33 U.S.C. § 1344(a).

[6]33 U.S.C. § 1251(7).

[7]40 C.F.R. § 230.3(s)(3) (1993). The "waters" include non-adjacent wetlands connected to interstate commerce. Common types of isolated wetland are vernal pools, which are a shallow depressions that floods during rainy periods, and prairie potholes, which are depressions that fill with snowmelt or rainfall.

[8]51 Fed. Reg. 41,217 (1988). The Corps determined that migratory birds create a sufficient tie to interstate commerce.

[9]*Leslie Salt Co.*, 55 F.3d at 1390.

[10]Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990).

[11]*Leslie Salt Co.*, 55 F.3d at 1397.

[12]115 S. Ct. 1624 (1995), discussed *infra* notes 106-128 and accompanying text.

[13]*Id.* at 1625.

proximately 60 years that the Supreme Court has found that Congress does not have the power to regulate pursuant to the Commerce Clause.[14]

This Note examines the history of the Commerce Clause since the 1930s up through the decision in *Lopez*. Further, this Note analyzes the Leslie Salt decision in light of *Lopez*. This Note asserts that the very tenuous tie between migratory birds and interstate commerce does not satisfy the tests of Commerce Clause enunciated in *Lopez*. Therefore, the EPA's determination that migratory birds have a sufficient nexus to interstate commerce to allow the Corps to regulate isolated wetlands pursuant to the CWA is unreasonable.

II. *LESLIE SALT CO. V. UNITED STATES*

A. Factual Statement

Leslie Salt Company ("Leslie") owned one hundred fifty-three acres of land in Newark, California that is divided into two parcels of approximately one hundred forty-three acres ("parcel 143") and ten acres ("parcel 10").[15] The property is surrounded on all sides by roads and highways.[16] Across one of the roads stands the San Francisco National Wildlife Refuge.[17] The nearest body of water, the Newark Slough, is approximately one quarter mile from the southernmost tip of the property, and that point is two miles from the San Francisco Bay.[18] The eastern one-third of Parcel 143 is pastureland including two pits, which were used for the deposit of calcium chloride.[19] The western part of Parcel 143 contains shallow basins that were used for crystallizing salt.[20] There are no tributary streams or rivers either on the property or adjacent to the property.[21] The property has never been inundated by tides but is subject to some backflow from culverts that run under the roads.[22]

The San Francisco Bay area has a distinct climate.[23] Throughout the year there is little rainfall but for the winter months when rain falls frequently.[24] During the rainy season the pits and basins fill up with water creating tempo-

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[14]Charles B. Schweitzer, *Street Crime, Interstate Commerce, and the Federal Docket: The Impact of United States v. Lopez*, 34 DUQ. L. REV. 71 (1995).

[15]Leslie Salt v. United States, 700 F. Supp. 476, 479 (N.D. Cal. 1988)("Leslie Salt I"), discussed *infra* notes 31-36 and accompanying text.

[16]*Id.* Parcel 143 is bordered on one side by Thornton Avenue, on the south side by the relocated Jarvis Avenue, and the east by Jarvis Avenue. Parcel 10 is located across relocated Jarvis Avenue to the south of Parcel 143 and bounded by Thornton and Jarvis Avenues. *Id.*

[17]*Id.*

[18]*Id.*

[19]*Id.*

[20]*Id.* The salt chrystallizers held salt brine during the final stage of the solar salt production process. The chrystallizers were constructed on dry land, by excavating shallow basins, and leveling and compacting the soil on the bottom to create a level and watertight surface. *Id.*

[21]*Id.*

[22]*Id.* Three culverts are located on these parcels. One is located at the southernmost tip of Parcel 10 and runs under Thornton Avenue to the Newark Slough. The second is located near the intersection of Jarvis and Thornton Avenues and runs under Thornton into the wildlife refuge. The third is located halfway up Thornton Avenue and also runs under Thornton into the wildlife refuge. *Id.*

[23]*Id.*

[24]*Id.*

rary ponds.[25] During this rainy season, migratory birds use these ponds for habitat.[26]

In October of 1985, Leslie began to dig a feeder ditch and siltation pond.[27] In 1986-1987, Leslie plugged one end of a culvert to stop the backflow onto its land.[28] A Corps representative visited the property and conferred with Leslie.[29] The Corps then issued a cease and desist order and some time later a letter asserting jurisdiction.[30] Thereafter, Leslie brought an action in federal court to contest the Corps' jurisdiction over its property.[31]

B. *Leslie Salt I*

The United States District Court for the Northern District of California was faced with the main issue of whether Leslie's property is a "water of the United States." The District Court first determined that the Corps must show the reasonableness of its interpretation by a preponderance of the evidence.[32] The District Court held that Leslie's property is not a "water of the United States."[33] The District Court came to this determination by focusing on the essential nature of the pits and basins.[34] The District Court observed that most of the year the property is dry and the mere ponding of water is not enough to bring the property under the net of "waters of the United States."[35] Further, the District Court referred to the Corps' own regulations stating that the Corps itself does not consider "artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation settling basins, or rice growing" as isolated wetlands.[36] The District Court determined that the pits and basins were settling basins.[37] Analyzing the Corps' determination that settling basins are not isolated wetlands, the District Court held that the pits and basins are

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[25] *Id.*

[26] *Id.*

[27] *Id.* at 481.

[28] *Id.*

[29] *Id.*

[30] *Id.* Although Leslie contests the Corps' jurisdiction it has done nothing to violate these orders.

[31] *Id.*

[32] *Id.* at 478. The District Court stated that this approach "requires consideration of a number of factors, including the degree of the Corps' scientific or technical expertise necessarily drawn upon to reach its interpretation, the consistency of the interpretation within the Corps, the length of adherence to the interpretation, and the explicitness of the Congressional grant of authority to the Corps." *Id.*

[33] *Id.* at 489. Leslie argued that the lands could not be "waters of the United States" because actions of the United States in building ditches running from the wildlife refuge to Newark Slough, thereby creating flooding on Leslie's property. The District Court stated that "[s]uch actions by a government agency undermine the balance struck by Congress between regulation and private ownership." *Id.* at 481. The District believed flooding brought on by such action should not be considered in determining the Corps' jurisdiction. *Id.*

[34] *Id.* at 485.

[35] *Id.*

[36] *Id.* at 485-86.

[37] *Id.*

not isolated wetlands, and therefore not "other waters" under 33 C.F.R. § 328.3(a)(3).[38]

C. *Leslie Salt II*

On appeal, the United States Court of Appeals for the Ninth Circuit applied the clearly erroneous standard of review to the District Court's decision.[39] The Ninth Circuit found that the District Court's decisions were clearly erroneous.[40] The Ninth Circuit held that the mere ponding of water in the pits is sufficient to fall within the meaning of the regulations.[41] Further, the Ninth Circuit stated that the Corps' regulation concerning interstate commerce and migratory birds is a proper exercise under the Commerce Clause.[42] The Ninth Circuit remanded the case to the District Court to determine whether the pits and basin had sufficient ties to interstate commerce to fall under the Corps' regulations.[43]

D. *Leslie Salt III*

On remand, the District Court was faced with the task of determining whether Leslie's property had sufficient ties to interstate commerce to be governed by the Corps' regulations.[44] The District Court held that the property did have sufficient ties to interstate commerce because the artificial ponds were used as habitat by some 55 species of migratory birds.[45]

E. *Leslie Salt IV*

On appeal, the Ninth Circuit was faced with the task of determining whether its prior holdings in Leslie Salt II were clearly erroneous. The Ninth Circuit held that its determinations concerning the nature of Leslie's land and its possible regulation were not clearly erroneous.[46] Further, the Ninth Circuit discussed the possible regulation of Leslie's land pursuant to the Commerce Clause.

In its analysis, the Ninth Circuit then determined the Commerce Clause was sufficiently broad to cover isolated wetlands. The Ninth Circuit cited cases that stand for the principle that regulation of wildlife fall within the ambit of

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[38] *Id.* Further, the District Court determined that Leslie's land was not a wetland because the land did not meet the definition of a wetland supplied in 33 C.F.R. § 328.3(a)(7). *Id.* at 486. The District Court determined that the land was not inundated or saturated or supported by typical vegetation, and therefore was not a "water of the United States." *Id.* at 486-89.

[39] *Leslie Salt Co.*, 896 F.2d at 357. The Court stated that the standard of review that the District Court should have applied is deference if the interpretation of the Corps is reasonable and not in conflict with the expressed intent of Congress. *Id.*

[40] The Ninth Circuit determined that the fact that governmental actions caused flooding on Leslie's land was irrelevant when determining the Corps' jurisdiction. *Id.* at 357.

[41] *Id.* at 359.

[42] *Id.* at 360.

[43] *Id.* The Ninth Circuit also held that Leslie's lands were wetlands under the CWA. *Id.*

[44] Leslie Salt Co. v. United States, 820 F. Supp. 478 (N.D. Cal. 1992). Further, the District Court held that the construction of feeder ditches and basins, the placement of plywood and sandbags, and construction of a large bulkhead and tide gate violated the CWA. *Id.* at 481.

[45] 700 F. Supp. at 480. The Court determined that the presence of the migratory birds coupled with the regulations from the EPA showed a connection to interstate commerce. *Id.*

[46] *Leslie Salt Co.*, 55 F.3d at 1396.

the Commerce Clause.[47] Also, the Court discussed *Hoffman Homes, Inc. v. EPA*.[48] In *Hoffman Homes*, the Seventh Circuit Court of Appeals found that migratory birds have sufficient connections to interstate commerce because of the fact that millions of people hunt, trap, and observe birds.[49]

F. *Leslie Salt V*

In October of 1995, the Supreme Court denied a Writ of Certiorari to the United States Court for Appeals for the Ninth Circuit.[50] In dissent, Justice Thomas stated that the Supreme Court should have heard this case. Justice Thomas believed that the *Lopez* decision demonstrated a willingness to curb Congressional action taken pursuant to the Commerce Clause.[51] Justice Thomas believed that the Supreme Court should continue on this path because the tie between the migratory birds and interstate commerce was even more unreasonable then the tie the Court disclaimed in *Lopez*.[52]

III. The Isolated Wetland/Migratory Bird Controversy[53]

A. Introduction to the Controversy

The government wishes to regulate isolated wetlands because migratory birds use these wetlands as habitat.[54] The government believes that these birds must be protected because the birds are important in themselves and play an important role in interstate commerce.[55] On the other hand, private landowners do not believe that the government should be able to regulate isolated wetlands because of the sole fact that birds happen to land on the wetland. This governmental action has always been feared because of the possibility of a centralized, oppressive government. The following three concerns taken together demonstrate the tension in this area. Our society wants to protect the

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[47] *Id.* The Court cites Hughes v. Oklahoma, 441 U.S. 322 (1979), which held that state regulations of intrastate wildlife fall within the ambit of the dormant Commerce Clause. Also, the Court cited Palila v. Hawaii Dep't of Land and Nat. Resources, 471 F. Supp. 985 (D. Haw. 1979), which held that a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and interstate movement of persons.

[48] 999 F.2d 256 (7th Cir. 1993).

[49] *Id.* at 1395. The Court stated that when reviewing a Congressional action taken pursuant to the Commerce Clause, courts should be highly deferential. Although the Court stated that the migratory bird rule may stretch the bounds of reason the Court could not say that the holding in Leslie II was clearly erroneous. *Id.*

[50] Cargill, Inc. v. United States, 116 S. Ct. 407 (1995). Cargill is the new owner of the land in question.

[51] *Id.* at 408.

[52] *Id.* at 409.

[53] *See* John A. Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. Davis L. Rev. 1237 (1995)(discussing the migratory bird/commerce clause controversy in great detail).

[54] *See* 51 Fed. Reg. 41,217 (1988)(regulating isolated wetlands because migratory birds use as habitat).

[55] *See* Steven M. Johnson, *Federal Regulationof Isolated Wetland*, 23 Envtl. L. 1 (1993)(discussing the importance of migratory birds and connection to interstate commerce). The Supreme Court stated that the protection of migratory birds is "a national interest of very nearly the first magnitude." North Dakota v. United States, 460 U.S. 300, 309 (1983).

environment but not at the expense of creating a Government that can regulate whatever it wants, for whatever reasons.

The controversy stems from many concerns. First, our society wants to protect wetlands.[56] Wetlands perform many functions in the environment including "the improvement of water quality, prevention of flooding and soil erosion, critical habitat for migratory birds and endangered species, quantities of natural resources, and other recreational, educational, and aesthetic benefits."[57]

Problematically, however, some wetlands (especially isolated wetlands) do not perform any of these functions.[58] Sometimes these isolated wetlands are simply holes in the ground that occasionally fill with water.[59]

Third, the Federal Government cannot regulate private land, and isolated wetlands, unless the wetland is connected to interstate commerce. The tie that has been established is the connection of migratory birds to interstate commerce.[60] This presents a problem because there are approximately 2.5 to 6 billion birds in the United States and of these, two-thirds are known to migrate.[61] Further, migratory birds land wherever there is any amount of water, including puddles in parking lots.[62]

B. *Hoffman Homes, Inc. v. EPA*

Although the caselaw concerning the "migratory bird" controversy is sparse, in Hoffman Homes, Inc. v. EPA, the Seventh Circuit Court of Appeals dealt with the issue.[63] In 1988, the EPA imposed a $50,000 administrative penalty against Hoffman Homes for the destruction of an isolated wetland.[64] The EPA levied this penalty for the filling and grading of a 0.8 acre, bowl-shaped depression known as Area A.[65] The EPA determined that Area A was an intrastate wetland.[66] In 1986, the Corps investigated the construction site and determined that Hoffman violated the CWA by filling two areas of the 43 acre par-

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[56]*See* Johnson, *supra* note 55(providing a brief overview of the reasons why wetlands are important and should be protected).

[57]*Id.* at 1. These benefits are also true of isolated wetlands.

[58]This is the case with the pits on Leslie's property.

[59]*See* Leslie Salt facts, *supra* notes 14-30 and accompanying text.

[60]51 Fed. Reg. 41,217 (1988).

[61]Leman, *supra* note 53, at 1241.

[62]Hoffman Homes, Inc. v. EPA, 961 F.2d 1310, 1322 (7th Cir. 1992), vacated, 999 F.2d 256 (7th Cir. 1993). During oral argument, the EPA admitted that a bird may land and drink from a puddle in a median of a highway. The EPA denied that it would have authority over the puddle because it is not a wetland.

[63]999 F.2d 256 (7th Cir. 1993). For more in-depth discussions of the Hoffman Home cases, *See* Stephen Jay Stokes, *The Limit of Government's Regulatory Authority Over Non-adjacent Wetlands: Hoffman Homes, Inc. v. EPA*, 15 ENERGY L.J. 137 (1994); *See also* Robert D. Icsman, *Hoffman Homes, Inc. v. Administrator, U.S. EPA: The Seventh Circuit Gets Bogged Down in Wetlands*, 54 OHIO ST. L.J. 809 (1993).

[64]*Hoffman Homes, Inc.*, 999 F.2d at 258.

[65]*Id.* Area A is part of a 43 acre parcel of land which is owned by Hoffman and used to develop a housing subdivision. *Id.*

[66]*Hoffman Homes, Inc.*, 961 F.2d at 1310-11. Area A was lined with relatively impermeable clay, the small depression gathered water and drained slowly after rainfalls. The EPA made this determination despite the fact that Area A was not connected to any other body of water, did not perform flood control, was not used for recreational, industrial, or educational purposes, and was not used by migratory birds. *Id.*

cel.[67] The Corps issued a cease and desist order and instructed Hoffman to apply for an after-the-fact permit.[68] The matter was referred to the EPA, which ordered Hoffman to restore the areas to their original condition.[69] Hoffman challenged the EPA's jurisdiction under the CWA and the parties met with an EPA Administrative Law Judge (ALJ), who found in favor or Hoffman.[70] The EPA appealed this decision to its Chief Judicial Officer (CJO), who reversed the ALJ.[71]

Hoffman appealed the CJO's decision to the Court of Appeals for the Seventh Circuit.[72] The Seventh Circuit determined that the legislative history of the CWA did not indicate congressional intent to protect isolated wetlands.[73] Further, the Seventh Circuit held that the connection between migratory birds and the wetland was not enough to satisfy the Commerce Clause test.[74]

Later the same year, the Seventh Circuit granted a rehearing and vacated its earlier opinion.[75] In *Hoffman Homes II*, the Seventh Circuit did a complete turn-around and decided that the connection between migratory birds and isolated wetlands was sufficient to satisfy the Commerce Clause test.[76] The Seventh Circuit declared that the EPA must only provide "substantial evidence" that migratory birds will use the wetland.[77] The Seventh Circuit determined that the EPA did not meet this standard.[78]

III. History of Commerce Clause[79]

A. 1930s to Lopez

In the 1930s, the Great Depression brought many changes to the political, societal, and judicial aspects of the United States.[80] During this time President

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[67] *Hoffman Homes, Inc.*, 999 F.2d at 259.

[68] *Id.* at 258. The permit was refused. *Id.*

[69] *Id.* Further, the EPA filed an administrative complaint seeking $125,000 penalty. *Id.*

[70] *Id.* The ALJ decided that Area A was an isolated wetland not subject to the CWA. The EPA failed to show that this wetland had any effect on any other body of water and could not prove that migratory birds frequented the wetland to tie it to interstate commerce. *Id.*

[71] *Id.* The CJO concluded that the EPA showed a minimal, potential effect on interstate commerce. *Id.*

[72] Hoffman Homes, Inc. v. EPA, 961 F.2d 1388 (7th Cir. 1992).

[73] *Id.* at 1313-14. The Seventh Circuit found that the legislative history only referred to lakes, streams, rivers, tributaries, and the territorial seas. *Id.*

[74] *Id.* at 1321. The Seventh Circuit stated that there must be some sort of human commercial activity must be connected to the migratory birds to satisfy the Commerce Clause. *Id.*

[75] Hoffman Homes, Inc. v. EPA, 975 F.2d 1554 (7th Cir. 1992)("*Hoffman Homes I*").

[76] *See* Stokes and Icsman, *supra* note 63 (discussing the impact and importance of *Hoffman Homes II*).

[77] *Hoffman Homes, Inc.*, 999 F.2d at 261. The Seventh Circuit believed that if the EPA could provide substantial evidence that migratory birds would use the wetland then a sufficient nexus would be created with interstate commerce. *Id.*

[78] *Id.* at 262.

[79] For the purposes of this Note the history of the commerce clause will begin with the post-New Deal cases. This late beginning is not an attempt to disregard or belittle the pre-1930 commerce cases, but during the New Deal the Supreme Court made many changes to Commerce Clause jurisprudence that are more important in the context of Lopez and this Note.

[80] John W. Boyle, *Constitutional Law—Commerce Clause—Regulation by Congress—The United States Supreme Court held that the Gun-Free School Zones Act of 1990 exceeded Congress' power under the Commerce Clause because the act sought to regulate a non-economic, intrastate activity*, 34 Duq. L. Rev. 187 (1995).

Franklin Roosevelt and Congress attempted to revitalize the United States through a program known as the New Deal.[81] The New Deal was an expansive, aggressive approach to governmental regulation. Due to this aggressive approach and changing times, Congress attempted to regulate many types of economic activities.[82] The Court responded to this aggressive approach with a new expansive reading of the Commerce Clause.[83] The first case that demonstrated the Court's new expanded approach was *United States v. Darby*.[84] Under the Fair Labor Standards Act of 1938, Congress attempted to set minimum wages and maximum hours for employees engaged in the production of goods for interstate commerce.[85] The Act prohibited shipment of any goods produced in violation of this Act and also made the employ of workers in violation of this Act a federal crime.[86] The Court held that Congress' plenary power over interstate commerce allowed it to prohibit any article which it deemed necessary.[87] The Court also held that Congress can regulate intrastate activity that has a substantial effect on interstate commerce.[88]

Darby established the new more expansive reading of the Commerce Clause.[89] The Supreme Court continued along this path in *Wickard v. Filburn*.[90] Under the Agricultural Adjustment Act of 1938, the Secretary of Agriculture was permitted to set quotas for the raising of wheat in every farm in the country.[91] The quotas were not only for wheat that would be sold interstate and intrastate, but also for any wheat raised for home consumption.[92] Filburn, a local farmer, did not believe that the Congress could constitutionally regulate the amount of wheat he could raise for home consumption.[93]

The Supreme Court believed that Congress had every right to set quotas on wheat used for home consumption. The Supreme Court held that, regardless of whether the activity is local or even commerce, if the activity *substantially effects* interstate commerce then Congress may regulate the activity.[94] The Supreme Court decided that although the wheat was used for home consumption, it still had the effect of keeping Filburn out of the market and therefore, effected the amount of wheat sold.[95] In so deciding, the Supreme Court rejected the past approach of "direct vs. indirect effects" and focused on the

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[81] *Id.* at 201.

[82] Schweitzer, *supra* note 14, at 89.

[83] *See* Boyle, *supra* note 80, at 201-2; *See also* Schweitzer, *supra* note 14, at 90-1.

[84] 312 U.S. 100 (1941). Darby overruled an earlier decision in Hammer v. Dagenhart, 247 U.S. 251 (1918), and expressly demonstrated the new expansive approach to aid Congress in a time of great economic disaster. Pre-Darby the Supreme Court measured the constitutionality of a regulation by considering whether the activity had a direct or indirect effect on interstate commerce or whether it was necessary for Congress to regulate the entire field. Boyle, *supra* note 80, at 203.

[85] 312 U.S. at 111.

[86] *Id.*

[87] *Id.* at 116-17.

[88] *Id.* at 115.

[89] *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987)(explaining in greater detail the controversy and decision of Darby).

[90] 317 U.S. 11 (1942). The Wickard decision stands as the most expansive reading of the Commerce Clause that the Supreme court has ever displayed.

[91] *Id.* at 115.

[92] *Id.*

[93] *Id.* at 113-14.

[94] *Id.* at 125.

[95] *Id.* at 128.

cumulative effect that the activity had on interstate commerce.[96] Furthermore, the Supreme Court stated that even though in Filburn's particular case the wheat may be trivial, Filburn's wheat may still be regulated because "his contribution taken together with that of many others similarly situated, is far from trivial."[97]

Wickard demonstrated the Supreme Court's willingness to allow Congress far reaching powers to regulate seemingly local activity under the Commerce Clause.[98] However, the case did not establish how far Congress could go in regulating these seemingly local interstate activities. These questions were answered in *Heart of Atlanta Motel, Inc. v. United States*[99] and its companion case *Katzenbach v. McClung*.[100] Under the Civil Rights Act,[101] places of public accommodation are prohibited from refusing rooms to travellers based on race.[102] In *Heart of Atlanta*,[103] the owners of the motel believed that Congress exceeded its authority in regulating its hotel which was a strictly local activity.[104] The Supreme Court disagreed with the owners because Congress could prohibit racial discrimination by motels which catered to interstate travel, no matter how local the operation, when the discrimination had an effect on interstate commerce.[105] In this case, the Supreme Court relied on two facts in making its determination. First, that the motel heavily depended upon the business of interstate travellers.[106] Second, Congressional testimony revealed evidence that discrimination had a substantial impact on interstate commerce.[107]

In *Katzenbach*,[108] the controversy centered on a restaurant which refused service to individuals based on race.[109] Again, the Supreme Court relied upon Congressional hearings that illustrated the substantial impact of racial discrimination in restaurants on interstate commerce.[110] The Supreme Court stated that it would not be a rubber stamp for Congress' actions, but would not invalidate Congressional actions when Congress can show a rational basis for concluding that a regulated activity affected interstate commerce.[111] Thus, from

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[96] *Id.* at 127-8.

[97] *Id.* at 127. This holding recognized that Congress may regulate a group of individuals pursuant to the Commerce Clause regardless of whether the individual has an effect on interstate commerce. *See* Perez v. United States, 402 U.S. 146, 154 (1971)(although loanshark was entirely local Congress can regulate him because he is "a member of a class which engages in extortionate credit transactions as defined by Congress . . . [where Congress has spoken to a certain class of activities and is within Congress' power] the courts have no power to excise as trivial individual instances of the class.").

[98] *See* Judge Louis H. Pollack, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995)(explaining in greater detail the decision and impact of the Wickard case).

[99] 379 U.S. 241 (1964).

[100] 379 U.S. 294 (1964).

[101] 42 U.S.C. § 2000(e).

[102] *Heart of Atlanta*, 317 U.S. at 247.

[103] *See* Alan N. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019 (1988)(explaining in greater detail the decisions in Heart of Atlanta and Katzenbach).

[104] 379 U.S. at 244.

[105] *Id.* at 258.

[106] *Id.* at 243.

[107] *Id.* at 252-53.

[108] *See* Greenspan, *supra* note 103.

[109] *Katzenbach*, 379 U.S. at 298.

[110] *Id.* at 304.

[111] *Id.* at 303-04.

the 1930s into the 1990s the Supreme Court consistently and continually gave Congress broad powers to legislate pursuant to the Commerce Clause. However, in the recent *Lopez* decision the Supreme Court ventured from its familiar path.[112]

In *Lopez*, for the first time in sixty years, the Supreme Court held that a Congressional action exceeded the powers granted to Congress under the Commerce Clause.[113] Alfonso Lopez was a twelfth grade student at Edison High School in San Antonio, Texas.[114] On March 10, 1992, he carried a concealed weapon onto the school grounds.[115] Under the Gun-Free School Zones Act,[116] Congress mandated that it is a Federal Offense for a person to possess a firearm within 1,000 feet of a school.[117] Acting on an anonymous tip, school authorities confronted Lopez, who relinquished the handgun.[118] A federal grand jury indicted Lopez on one count of knowing possession of a firearm in a school zone, in violation of § 922(q).[119] Lopez moved to dismiss his indictment on the ground that § 922(q) was unconstitutional.[120] The Supreme Court affirmed the finding of the Court of Appeals.[121]

The Supreme Court held that the Act exceeded Congress' Commerce Clause authority.[122] The Supreme Court gave two reasons for the decision that the Act exceeded Congress' power; first, Congress sought to regulate a non-economic activity[123] and second, the Act did not require that the firearm affect interstate commerce.[124]

In reaching this conclusion, the Supreme Court gave an overview of Commerce Clause jurisprudence and the trend to uphold Congressional action under the Commerce Clause. However, the Supreme Court stressed that throughout the history of Commerce Clause jurisprudence it has maintained that the Commerce Clause does have limits.[125] The Supreme Court then iden-

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[112] *See* Boyle, *supra* note 80; *See also* Schweitzer, *supra* note 14 (discussing the importance of the Lopez decision to the Supreme Court jurisprudence).

[113] *Lopez*, 115 S. Ct. at 1626.

[114] *Id.*

[115] *Id.* Lopez carried a .38 caliber handgun with five bullets. *Id.*

[116] 18 U.S.C. § 922 (q)(1)(A)(1990). This section provides a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The section does not require any connection to interstate commerce.

[117] *Lopez*, 115 S. Ct. at 1626. 18 U.S.C. § 921 (a)(25)(1990) defines school zone as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school."

[118] *Id.*

[119] *Id.*

[120] *Id.* The District Court determined that § 922(q) was a constitutional exercise of Congress' power under the Commerce Clause. The District Court found Lopez guilty of violating § 922(q). The Court of Appeals for the Fifth Circuit reversed the District Court and found that Congress' power under the Commerce Clause could not justify § 922(q). *Id.*

[121] *Id.* at 1630.

[122] *Id.* at 1625. The majority opinion was written by Chief Justice Rehnquist.

[123] *Id.* at 1630. Chief Justice Rehnquist stated that "Section 922(q) is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise . . . [the Act is not part of] a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.*

[124] *Id.* at 1632.

[125] *Id.* at 1628. In Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1980), then Justice Rehnquist concurring stated that "it would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may

tified three areas that Congress may regulate pursuant to the Commerce Clause; (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, and (3) intrastate activities that have a substantial effect on interstate commerce.[126] The Supreme Court maintained that the Gun-Free School Zones Act could only, if at all, be justified as a regulation of intrastate activity which had a substantial effect on interstate commerce.[127]

The Supreme Court conceded that past decisions upheld a variety of Congressional actions, but stated that a pattern developed in that all the actions had a substantial effect on interstate commerce and were commercial in nature.[128] Further, the Supreme Court noted that § 922(q) did not require that the regulated activity have a connection to interstate commerce.[129] In other words, the statute only required that a person possess a firearm in the restricted area, but did not explicitly require a connection to interstate commerce. The Supreme Court decided that since the statute had no requirement of a connection to interstate commerce, it must analyze the legislative findings to determine if Congress stated that there is an explicit connection to interstate commerce.[130] The Supreme Court found no evidence in the legislative history.[131] The Supreme Court noted that although the lack of legislative history is not dispositive, it does hamper the efforts in determining the rationale behind the statute.[132]

The Supreme Court stated that determinations of Congressional power under the Commerce Clause are difficult and "[are] necessarily one of degree."[133] Further, the Supreme Court stated that there are no precise formulations in Commerce Clause cases, but the following factors point to the correct decision; (1) possession of a firearm in a school zone is in no sense an eco-

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be so private or local in nature that they simply may not be in commerce." *Hodel*, 452 U.S. at 310.

[126]115 S. Ct. at 1629-30. The cases discussed above fall into these categories. *Id.*

[127]*Id.* at 1630.

[128]*Id.* The Court cited Wickard stating "[e]ven Wickard, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." *Id.*

[129]*Id.* The majority cited United States v. Bass, 404 U.S. 336 (1971). In Bass the Supreme Court interpreted a statute which made it a crime for a felon to "receive, possess, or transport in commerce or affecting commerce . . . any firearm." The Supreme Court interpreted the statute to require more then the mere possession of firearms. Unlike Bass, Lopez does not have this requirement. *Id.*

[130]*Id.* at 1631-1632.

[131]*Id.* The Brief of the United States conceded the fact that no evidence could be found in the legislative history. *Id.* The United States instead argued that congress has expertise in this area and the courts should defer. The majority rejected this argument stating that this statute is a ground breaker in an area that Congress has never made findings on the impact on interstate commerce. *Id.*

[132]*Id.* at 1632. The majority believed that allowing Congress to act as experts without any legislative findings would open the door to regulate in areas traditionally left to the states. *Id.*

[133]*Id.* at 1633. The majority quoted Justice Cardozo from his opinion in United States v. A.L.A. Schechter Poultry Corp. 76 F.2d 617, 624 (1935). Cardozo stated "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours is an elastic medium which transmits all tremors throughout its territory; the only question is the size." Throughout the majority opinion the Supreme Court attempts to justify its departure from the past attitude of deference through quotes such as the one above.

nomic activity that through repetition elsewhere substantially effects any sort of interstate commerce, (2) Lopez was a local student at a local school, (3) no evidence to show that he recently had moved in interstate commerce, and (4) no requirement that his possession have a concrete tie to interstate commerce.[134] The Supreme Court believed that the above factors lead to a conclusion that Congress cannot regulate this activity pursuant to the Commerce Clause.[135] Therefore, after *Lopez*, the Supreme Court developed a three-step process of determining whether an activity can be regulated. The first step was that the activity must be commercial in nature. The second step was that the regulation must require a connection with interstate commerce. Furthermore, if after an initial determination that the activity can be potentially regulated, the Supreme Court must determine that the activity substantially effects interstate commerce and thus, can be regulated pursuant to the Commerce Clause.

V. The Irrationality of the Migratory Bird Rule

While the EPA has determined that the migration of birds effects interstate commerce,[136] the judiciary has the last word on whether this determination is rational.[137] Therefore, the Supreme Court may decide that the EPA's determination that the migration of birds effects interstate commerce is not rational and may come to this decision through much the same analysis as in *Lopez*. Although the challenge in *Lopez* was to the statute and the challenge here is to the EPA's application of the statute, the test is the same; determine if the acting body has a rational basis.

The Supreme Court in *Lopez* stated that Congress is unable to regulate a non-economic activity under the Commerce Clause and there must be a requirement that the action has a explicit connection with interstate commerce.[138] The Supreme Court stated that a law making illegal possession of a firearm within a confined area is not connected with economic activity because it is a criminal statute that by its very terms is not connected to commerce.[139] Similarly, in the case of migratory birds, there is no connected economic activity.[140] Migratory birds are not items of commerce, but are different than other items of commerce because these birds can transport themselves across state lines.[141] The only economic activity that can be connected with migratory birds is that hunters and birdwatchers will interact with these birds.[142] In *Hoffman Homes I*, Judge Manion stated that "no federal court has ever held that

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[134] *Id.* The majority stated that to except the Government's position, they would have to pile inference on inference in a way that would turn the Commerce Clause power into Police Power. *Id.*

[135] *Id.*

[136] 51 Fed. Reg. 41,217 (1988).

[137] *Lopez*, 115 S. Ct. at 1628. In Heart of Atlanta, Justice Black stated "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."

[138] *Id.* at 1630-32.

[139] 115 S. Ct. at 1630. The Court cited President George Bush who stated that § 922(q) inappropriately overrides legitimate state firearms laws with a new and unnecessary Federal law. *Id.*

[140] Leman, *supra* note 53, at 1261.

[141] *Hoffman Homes, Inc.*, 961 F.2d at 1319-20.

[142] *Id.*

the mere presence of wildlife—actual or potential, interstate or intrastate— is enough to invoke the Commerce Clause power."[143] Therefore, for migratory birds to be part of an economic activity and under the ambit of the commerce clause humans must interact with them.[144]

In *Leslie Salt*, the Ninth Circuit Court of Appeals stated there is no interaction with migratory birds that in the case of the pits on the property of Leslie Salt.[145] Further, the Ninth Circuit stated that the only humans that hunt or photograph the birds using these ponds apparently are doing so after they have reached other locations.[146] The only problem with this analysis is that no one knows for sure that the particular birds that land on Leslie's land ever interact with humans.[147] There was no evidence showing that after these birds left Leslie's land, they met with human interaction. Without such evidence of human interaction, the birds are not affecting interstate commerce and cannot be an item of commerce under the *Lopez* test.[148] Therefore, without the birds being a item of interstate commerce, Congress cannot use the birds as a vehicle to regulate wetlands pursuant to the Commerce Clause.

Further, the Supreme Court in *Lopez* stated that the mere possession of a firearm is not enough to invoke the Commerce Clause.[149] In *Leslie Salt IV*, the Ninth Circuit held that the Commerce Clause can be used to govern wetlands that are merely used by migratory birds.[150] The EPA's interpretation along with the holding in *Leslie Salt IV* does not limit the reach of the statute to a discrete set of wetlands that "additionally have an explicit connection with or effect on interstate commerce."[151] Without an explicit connection to interstate commerce, the regulation must fail.

Migratory birds land everywhere (even parking lot puddles), frequently doing no more then taking a drink and then flying away.[152] The EPA admitted they would not regulate the puddle, but they will regulate a hole in the ground such as the pit on Leslie Salt's property, which serve much the same purpose for the birds as a puddle.[153] It seems unreasonable to suggest that these migratory birds use these isolated wetlands as habitat, which is the sole purported reason Congress wishes to regulate these wetlands because the birds and their

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[143] *Id.* Judge Manion cited Douglas v. Seacoast Product, Inc., 431 U.S. 265 (1977), which dealt with a Virginia licensing statute which prohibited non-citizens from fishing commercially in state waters. The Supreme Court held that the fishermen moving state to state is enough to fall within the ambit of the Commerce Clause. The fish were not the reason that the Commerce Clause was invoked, the fishermen created the interstate commerce considerations. *Id.*

[144] 961 F.2d at 1319-20. The majority discussed the human interaction element of interstate commerce in detail.

[145] *Leslie Salt Co.*, 55 F.3d at 1395. The Court stated that no evidence was presented of human contact with the ponded areas. *Id.*

[146] *Id.*

[147] The cumulative effects theory, discussed *supra* note 97, does not work in this instance because Chief Justice Rehnquist stated that since the gun in not part of a commercial transaction the aggregate cannot be seen substantially effect interstate commerce. The same can be said of migratory birds. They are not part of a commercial transaction.

[148] *Hoffman Homes, Inc.*, 961 F.2d at 1319-20.

[149] *Lopez*, 115 S. Ct. at 1631.

[150] *Leslie Salt Co.*, 55 F.3d at 1395-96.

[151] *Lopez*, 115 S. Ct. at 1632.

[152] *See Hoffman Homes, Inc.*, 961 F.2d at 1322.

[153] *Id.*

habitat must be protected to preserve interstate commerce. However, the birds do not use these wetlands as habitat and one is hard-pressed to determine that filling these wetlands will affect the birds. Therefore, the regulation of these wetlands is unreasonable because it does not further interstate commerce.

Furthermore, following the four factors that led to the decision in *Lopez*, the decision in Leslie Salt is arguably improper. The first factor in Lopez was that the possession of a firearm in a school zone is in no sense an economic activity that through repetition elsewhere substantially effects any sort of interstate commerce.[154] The same can be applied to birds that land at isolated wetlands. A bird in and of itself is not an item that effects interstate commerce.[155] The bird must interact with humans.[156] In *Leslie Salt* there is no proof that the birds that landed at the pit ever interacted with humans.[157] Therefore, despite the repetitive action of birds landing at isolated wetlands throughout the United States, the absence of proof that they interact with humans supports the conclusion that there is no substantial effect on interstate commerce.

The second factor was that Lopez was a local student at a local school.[158] The Supreme Court stressed the fact that the actions of Lopez were entirely local in nature.[159] In *Leslie Salt*, the isolated wetland is local and the property on which it sits is local.[160] The actions on a piece of privately owned property is a type of feature that is local in nature. There is little chance that the activities on a plot of land can affect interstate commerce more than a student possessing a firearm in a public school.

The third factor was the lack of evidence showing that Lopez recently had moved in interstate commerce.[161] Again, there was no evidence presented in *Leslie Salt* that the birds had recently moved in interstate commerce (i.e. human interaction), and without human interaction the birds cannot be an item of interstate commerce or even connected to interstate commerce.[162]

The fourth factor was that the statute did not require that the possession of the firearm have a concrete tie to interstate commerce.[163] In the case of migratory birds, there likewise no requirement that the birds have a "concrete tie" to interstate commerce.[164] The Ninth Circuit in *Leslie Salt IV* agreed with the Corps and determined that migratory birds *in and of themselves* are a concrete

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[154] *Lopez*, 115 S. Ct. 1633.

[155] Leman, *supra* note 53, at 1261.

[156] *Hoffman Homes, Inc.*, 961 F.2d at 1319-20.

[157] *Cargill, Inc.*, 116 S. Ct. at 409.

[158] *Lopez*, 115 S. Ct. at 1633.

[159] *Id.* at 1632. The Supreme Court has always maintained that there are some actions that are local and cannot be regulated pursuant to the Commerce Clause. If a person digs deep enough there will always be a connection to interstate commerce, but the Supreme Court will draw the line in certain circumstances.

[160] *Leslie Salt Co.*, 700 F. Supp. at 478.

[161] *Lopez*, 115 S. Ct. at 1633.

[162] *Hoffman Homes, Inc.*, 961 F.2d at 1319-20.

[163] *Lopez*, 115 S. Ct. at 1633.

[164] The regulation only states that waters of the United States include waters which are or would be used as habitat other migratory birds which cross state lines. There is no requirement that birds be connected to interstate commerce through interaction with humans. The Corps felt that the birds themselves were items of interstate commerce.

tie to interstate commerce,[165] contrary to the Seventh Circuit's position expressed in *Hoffman Homes I.* However, without human interaction the birds are not a tie to interstate commerce.[166] The statute does not require any human interaction which is the exact problem that the Supreme Court identified in *Lopez.*

VI. Conclusion

Isolated wetlands are usually privately owned lands that have little connection to interstate commerce. The only tie to interstate commerce is the supposed tie between migratory birds and humans that may hunt, photograph, or trap these birds. This interaction with humans develops a tie with interstate commerce. This use of migratory birds is simply a way to regulate something that the Government should have no control over. The Courts have for many years taken the approach of deferring to any Government regulation if there is a rational basis for the action.[167] Most regulation can be given some rational basis and therefore, the courts have deferred to many actions that should not be subject to federal control.

The migratory bird rule is a blatant abuse, and classic example, of the EPA's power to make such regulations. There is not much doubt that migratory birds do create recreation and hunting opportunities for people and therefore have a minimal effect on interstate commerce. However, everything in the world can be ultimately tied to interstate commerce if one searches enough.[168]

The landmark decision of *Lopez* stands for a great many things. The most important is Supreme Court's new attitude towards the Commerce Clause. The Supreme Court has acquiesced to Congress for the last sixty years anytime Congress mentioned interstate commerce.[169] Now that the Supreme Court has taken a stand in Commerce Clause jurisprudence, this type of regulation should be taken to task. The holding in *Lopez* is important for the fact that it is a radical departure from the past sixty years, but even more important is the attitude the Supreme Court now holds towards the Commerce Clause. The Supreme Court has taken a step towards checking actions of Congress taken pursuant to the Commerce Clause. This single case may begin an onslaught to invalidate Congressional action. The best place to start this onslaught is with the migratory bird/commerce clause controversy. As Justice Thomas stated, "[this controversy] raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the Clean Water Act."[170] He further expressed "doubts about the propriety of the Corps' asser-

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[165] *Leslie Salt Co.*, 55 F.3d at 1394.

[166] *Hoffman Homes, Inc.*, 961 F.2d at 1319-20.

[167] Leman, *supra* note 53, at 1254.

[168] *Id.* at 1265.

[169] *See* Schweitzer, *supra* note 14 (explaining the significance and change in attitude of the Supreme Court in Commerce Clause jurisprudence).

[170] *Cargill, Inc.*, 116 S. Ct. at 409.

tion of jurisdiction."[171] The Supreme Court should follow Justice Thomas' suggestion to strike down the Corps' regulation.

Michael Bablo

[171] *Id.*